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If the treaty-making power which resides in the federal government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, (since it is denied to the States,) and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands that protection which is most common amongst a majority of modern civilized nations.

I agree with my associate in the conclusion, that the treaty-making power of the federal government was sufficient to enable it to insert the article in the treaty with Prussia, which has before been quoted; and that the alien heirs of Deeck are protected by its provisions, and are entitled to the withdrawal of the proceeds of the estate.

I therefore concur in the reversal of the judgment.

In the Supreme Court of Ohio, December Term, 1854.

JOHN M. BASHFORD vs. ANDREW J. SHAW.

1. In case of guaranty, demand of payment of the principal debtor, and notice of his default, are requisite to charge the guarantor, only, where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantor, or depends on *his option*.
2. But where the contingency which determines the liability of a guarantor, is one which is known to him, or which he is bound to know, or where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril.
3. In order to discharge a guarantor from liability, on the ground of want of notice of the default of the principal debtor, there must be, not only a want of the notice *within a reasonable time*, but there must be also some *actual loss or damage* thereby caused to the guarantor. And if such loss or damage does not go to the whole amount of the claim, but is only in part, the guarantor is not wholly discharged, but only *pro tanto*.
4. If the principal debtor be solvent when the note falls due, and due notice of the default be not given, and the principal afterwards, and before notice, becomes insolvent, the guarantor is discharged.
5. The continued insolvency of the principal debtor from the time of the maturity of the debt, as a general thing, dispenses with the necessity of the notice, in order to charge the guarantor.

6. Where the undertaking of the party is to guaranty the payment of the note of another, *after final process*, the prosecution of the claim to final process against the maker of the note is essential, in order to charge the guarantor.
7. But an omission to bring suit against the original debtor, within a reasonable time, will not discharge the guarantor from liability, where the terms of the guaranty do not describe the degree of diligence to be used in the proceeding, by suit, and where, in consequence of the continued insolvency of the principal debtor from the time of the maturity of the debt, the guarantor suffered no loss by the delay.

Petition in error, to reverse the judgment of the Common Pleas of Morrow County.

The original action was brought by the plaintiff in error, on the 15th of January, 1853, on the defendant's guaranty of the payment of a promissory note, before George D. Cross, Esq., a justice of the peace, who, upon the trial of the cause, rendered judgment in favor of the plaintiff. The defendant appealed. In the Common Pleas, the plaintiff declared in assumpsit on the following instrument, to wit :

“IBERIA, July 28th, 1849.

“On or before the fifth day of March, I promise to pay A. J. Shaw, or bearer, the sum of thirty-five dollars, for value received.

(Signed)

“JOHN BONER.”

Endorsed as follows :

“December 8th, 1849. I guarantee the payment of the within note, after final process.

(Signed)

“A. J. SHAW.”

The defendant plead non-assumpsit. At the September term of the Common Pleas, 1853, the parties waived the intervention of a jury, and submitted the cause to the court, upon the instrument declared on, and an agreed statement of the facts, as follows, to wit :

“It is agreed in this case, that the defendant, in consideration that the plaintiff had sold him a horse, on the 8th of December, 1849, made the endorsement appearing on the said promissory note; that the note became due on the 5th day of March, 1850. On the 13th day of January, 1851, Bashford commenced suit on

the note against Boner, the maker of the note, before William Shunk, a justice of the peace, and on the 25th of January, 1851, recovered a judgment. And it is further agreed, that at no time after the note became due, could any part of the same have been collected from said Boner, on account of insolvency; and that execution had been issued on the said judgment against him, January 25th, 1851, and returned February 20th, 1851, 'No goods or chattels found whereon to levy.' And that the present action on the guaranty was commenced on the 15th of January, 1853."

Upon this state of the case, the Common Pleas found for the defendant. The plaintiff moved for a new trial, but the court overruled the motion and rendered judgment for the defendant; whereupon the plaintiff duly excepted to the decision of the court.

Stinchcomb & Brumback, for plaintiff.

Dunn & Gurley, for defendant.

BARTLEY, J.—The undertaking of the defendant declared on, in the original action in the court below, constituted a *guaranty* of the payment of Boner's note, after proceedings for the collection of the same had been prosecuted to final process. And the questions which arise for determination are the following:

First, whether the plaintiff's right of recovery in the court below, could be defeated by want of evidence of *notice* to the defendant of the default of the maker of the note; and if not,

Second, whether it was defeated by the delay which occurred in the prosecution of the claim to final process.

Of these, in their order.

1. The rule in regard to demand of payment and notice of the default, required to charge endorsers of negotiable paper, is not applicable to guarantees. In the former, the demand and notice is, by an arbitrary rule of the law merchant, strictly required, as a condition precedent to liability; while in the latter, the demand and notice of the default of the principal, is a simple duty required of the holder, with a view of saving the guarantor from *actual loss*, which may arise from want of convenient and certain means of knowledge. There are several classes of guaranties, in which

demand and notice are not required at all. For instance, where a guaranty is in the nature of a simple security, undertaken originally, and with the principal, that a debt shall be paid, or some other act be done, the liability attaches without demand of payment and notice of the default. *Chapin vs. Lapham*, 20 Pick. Rep. 467. So, where the undertaking is an absolute and independent stipulation to pay the debt of another at all events, no demand and notice is said to be necessary. And in the case of *Bush vs. Critchfield*, 4 Ohio Rep. 103, it was held, by the Supreme Court of this State, that where the guarantors had covenanted that their principal should sell and account for all merchandise placed in his hands by the plaintiff, within a stated period, no notice of the non-performance by the principal was necessary. To the same effect is the case of *Douglass vs. Howland*, 24 Wend. Rep. 35; also, *Hammond vs. Gilmore's Adm'r*, 14 Conn. Rep. 479.

Demand and notice, however, are requisite to charge a guarantor, where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantee, or *depends on his option*. But where the fact which determines the liability, is one which the guarantor knows, or is bound to know, or which is equally within the power of both parties to ascertain; in other words, where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril. *Farwell vs. Smith*, 12 Pick. 83 and 87; *Davis vs. Duvall*, 4 Wash. C. C. Rep. 181; also, *Wyse vs. Wakefield*, in the Court of Exchequer, 6 Meeson & W. 442. The application of the rule requiring demand and notice, founded on the reasons above mentioned, is cleared of all difficulty, in case of the guaranty of the goodness or collectability of a debt. The contingency upon which the liability is made dependent, rests upon the *action* of the guarantee, and depends on his *option*. The result of his efforts to enforce the liability of the principal, and the period of their termination, are of necessity peculiarly within his knowledge. He is therefore, reasonably and properly, required to give notice to the guarantor of the default of the principal, before bringing the suit upon the guaranty. *Grier vs. Ricks*, 3 Devereaux, 62; *Adcock vs. Fleming*, 2 Dev. & Bat. 225; *Lewis*

vs. *Bradley*, 2 Iredell, 303; and *Sylvester vs. Downing*, 18 Vermont Rep. 32.

In the cause before us, the engagement of the defendant was the guaranty of payment after final process. This required the plaintiff to prosecute the original liability to final process; and the fact upon which the contingency of the defendant's liability was made to depend, consisted in non-payment after the requisite remedy for the collection of the claim had been used. And this, depending upon the action of the plaintiff, left the default, after the termination of the efforts for collection, peculiarly within his knowledge; so that notice to the defendant of the default, would have been essential, before his liability could have been enforced, had it not been dispensed with, by the circumstance hereafter noticed, which took the case out of the operation of the rule.

The ground, however, upon which notice of the default of the principal is required, in case of guaranty, clearly distinguishes it from the notice required to charge an endorser, in the ordinary case of the endorsement of commercial paper. The latter is entitled to strict notice, without delay, and without regard to consequences. But in case of guaranty, notice of the default is sufficient, if it be given in a reasonable time. In the cases of *Wild vs. Savage*, 1 Story's Rep. 22; and *Howe vs. Nickels*, 22 Maine Rep. 175, the adjudications on this subject are very fully reviewed, and the doctrine shown to be well settled, that in order to discharge a guarantor from liability on the ground of want of notice, there must be, not only a want of notice of default, within a reasonable time, but there must be also some actual loss or damage thereby sustained by the guarantor; and if the loss or damage does not go to the whole amount of the claim, but is only in part, that the guarantor is not wholly discharged, but only *pro tanto*, or, according to the extent of the loss. If the principal be solvent when the note falls due, and the requisite notice be not given to the guarantor, and the principal afterwards, and before notice, becomes insolvent, the guarantor is discharged. But where the notice could have afforded no benefit to the guarantor, and he has suffered no *actual loss* by want of it, he is not discharged by the omission to give it. Where,

therefore, the principal is insolvent when the debt becomes due, or where the duty is first imposed on the guarantee to require payment, and continued insolvent, notice to the guarantor, being unnecessary, is dispensed with; and it is said that, in such case, even a demand upon the debtor is not ordinarily required. This doctrine seems to be fully sustained by the leading authorities in England. *Warrington vs. Furber*, 8 East, 242; *Phillips vs. Astling*, 2 Taunt., 206; *Holbrow vs. Wilkins*, 1 Barn. & Cress. 10; and *Van Wart vs. Wooley*, 3 Barn. & Cress. 439. In the last case, Lord Tenterden said, "that in cases of guaranty, the nature of the transaction, and the circumstances of the particular case, were to be considered and regarded; and that, where the debtor had become bankrupt, a demand on him was unnecessary to charge the guarantor." And these cases are full to the effect, that where it does not appear that the guarantor has sustained any damage or loss, either from the want of due presentment to the debtor for payment, or from the want of due notice of the default, the guarantor is not discharged. The same doctrine is pointedly asserted in the case of the *Oxford Bank vs. Hayes*, 8 Pick. 423; and recognized in *Gibbs vs. Cannor*, 9 Serg. & Rawle, 202. And the case of *Reynolds vs. Douglass*, 12 Peters, 497, decided in the Supreme Court of the United States, is a leading case, to the effect that the guarantor is bound without notice, where the principal is insolvent at the time when the debt becomes due; and that this liability continues, unless the guarantor can show that he has sustained some actual prejudice by the want of due notice of the default of the debtor; and that, if any actual loss has been sustained, he will be discharged only to the amount of the damage sustained. This was to the full extent affirmed in the case of *Rhett vs. Poe*, 2 Howard's Rep. 484.

The application of this doctrine, therefore, which appears to be founded in reason and well settled by authority, to the cause under consideration, removes all difficulty in the determination of the first point. It is shown, by the agreed statement of facts in the case, that the principal debtor (Boner) was wholly insolvent when the note fell due, and ever afterwards remained so. Notice of his default, therefore, became unnecessary, and was dispensed with;

and the want of such notice constituted no ground of defence in the court below.

2. Did the delay, which occurred in the prosecution of the claim against the original debtor, interpose any bar to the plaintiff's recovery? The note became due on the 5th of March, 1850, but suit was not commenced on it till the 13th day of January, 1851; being the lapse of a little over ten months after the maturity of the debt. Judgment, however, was taken against him on the 25th day of January, 1851; and, on the same day, execution was issued on the judgment, which, on the 20th day of February, 1851, was returned, "No goods or chattels found whereon to levy." The debt, therefore, remained unpaid after final process; so that the contingency occurred against which the guarantor stipulated. But, it is claimed that the suit was not prosecuted against Boner in due time, and that, upon this ground, the defendant was discharged from his liability.

It was incumbent on the plaintiff to prosecute the claim against the principal debtor to final process. The terms of the guaranty required this. The stipulation of the defendant was to insure the payment after final process. Nothing could dispense with this proceeding against the principal; for it was essential to produce the event by which, alone, the liability of the defendant could be fixed. But there is nothing in the terms of the guaranty expressly fixing or prescribing the degree of diligence to be used, or the time within which the proceeding should be instituted. Where, by the terms of a contract, however, an act is required to be done, but the time for doing it is not expressly prescribed, the law, by implication, requires that it shall be done within a *reasonable time*.

It is sometimes the case, that the terms of a guaranty fix the degree of diligence to be used, or the time and manner in which the proceedings shall be prosecuted against the principal; and where this is the case, it has been held, that the terms of the guaranty must, in this respect, be strictly pursued, otherwise the liability of the guarantor will be discharged. Such appears to be the effect of the case of *Dwight vs. Williams*, 4 McLean's Rep. 582; also, *White vs. Case*, 13 Wend. Rep. 543; and *Eddy vs. Stanton*,

21 Wend. Rep. 255. In the last case, the court say, in their reasoning, that although the principal debtor may be said to be insolvent, yet it is impossible to anticipate the fruits which may arise from the due prosecution of the claim. Property may be discovered, or some friend come forward and satisfy the debt, etc. But in these and other cases referred to, the attention of the court appears to have been directed to the question, whether the legal remedies could, for any cause, be dispensed with, rather than the time within which they should be prosecuted.

But the case before us is clearly distinguishable from the cases referred to. The defendant, in the agreed statement of facts, admitted that, *at no time after the note became due, could any part of it have been collected from the principal debtor.* The stipulation in the guaranty was, to warrant payment after final process. The reasonable time implied for the pursuit of the legal remedy, had relation to all the circumstances surrounding the case. The *object* in requiring diligence in the proceeding against the principal, was *safety* to the guarantor. And, inasmuch as it was apparent, when the note became due, that nothing could be collected from Boner, a delay of a few months in commencing suit against him, operated beneficially to the guarantor, as it was indulgence to him, and afforded time to the principal debtor to accumulate means. There is, certainly, no sensible and substantial reason why this delay should operate to discharge the guarantor. This is not a case requiring the application of the strict and arbitrary rules of the mercantile law, sometimes so essential to secure promptness and vigilance, with a view to certainty and confidence in commercial transactions. And the defendant cannot claim for himself the observance of that strictness sometimes allowed in favor of sureties; for his engagement does not stand upon the consideration of the original debt, but is founded on an independent consideration, for his own benefit. Had the defendant specially stipulated in the contract for diligence, on the part of the plaintiff, in commencing suit against the maker of the note, or had he specially directed it to be done, he might, with some reason, insist on the non-compliance by the plaintiff, as a ground for his discharge. Or had the defendant

suffered loss, by the delay in the proceeding against the maker of the note, he would certainly be entitled to a discharge from his liability, so far, at least, as he had been damnified. But since he has been in nowise whatsoever prejudiced by the delay, there exists no just and substantial reason for his discharge from his liability on this ground.

We are of opinion, therefore, that there is error in the proceedings of the court below.

Judgment of the Common Pleas reversed, and the cause remanded for further proceedings.

In the District Court of the United States, Southern District of Ohio,—April Term, 1856.

EX PARTE ROBINSON, MARSHAL OF SAID DISTRICT,—HABEAS CORPUS.

1. The 7th section of the act of Congress of the 2d of March, 1833, authorizes any judge of the United States to issue the writ of habeas corpus where an officer of the United States is imprisoned "for any act done or omitted to be done, in pursuance of a law of the United States."
2. It is the proper remedy where a marshal is imprisoned by the sentence of a State judge as for a contempt in not producing the bodies of certain persons named in a writ of habeas corpus issued by such judge, and if it appears from the evidence that such persons were legally in the custody of the marshal pursuant to the provisions of the Fugitive Slave act, and that his refusal to produce them before the State judge was a paramount duty by the terms of the said act, the marshal is entitled to his discharge under the said 7th section of the act of 1833.
3. In ordering his discharge upon a habeas, a judge of the United States does not assume a jurisdiction to review or reverse the sentence or judgment of the State judge, but merely exercises a power expressly conferred by an act of Congress.
4. Although the authorities are not uniform as to the right of a State judge to issue the writ of habeas corpus, where the imprisonment is under the authority of a law of the United States, it is well settled, that when the fact is proved that the imprisonment is under such authority, the jurisdiction of the State judge is at an end, and all subsequent proceedings are *coram non judice*.

Messrs. Ketchum and Headington, for the marshal.

Messrs. Cox and Jolliffe, in opposition to the discharge.